No. 473

IN THE

Supreme Court of the United States

October Term, 1947.

STANLEY W. ROOT, WILLIAM J. EASTWOOD and NORMAN KLAUDER, Trustees of STANLEY ENGINEERING CORP., Bankrupt,

and

GABY COMPANY, *Petitioners*,

vs.

MORRIS GALMAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Stanley W. Root, William J. Eastwood and Norman Klauder, Trustees of Stanley Engineering Corp., Bankrupt, and Gaby Company, pray that a writ of certiorari issue to review the judgment of the United States

Circuit Court of Appeals for the Third Circuit entered November 6, 1947, reversing the order of the District Court of the United States for the Eastern District of Pennsylvania entered May 13, 1947.

OPINION BELOW.

The Opinion of the Circuit Court of Appeals is not reported. The Trial Court rendered no opinion.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Statutes 938.

The judgment of the Circuit Court of Appeals for the Third Circuit was filed November 6, 1947, and the mandate was stayed for 30 days from November 21st, 1947.

QUESTIONS PRESENTED.

1. Has a Judge of the District Court abused his legal discretion in refusing to confirm a bankruptcy sale of real estate where such real estate is sold discharged of encumbrance liens, and,

(a) The bid is not sufficient in amount to pay such encumbrances, liens, interest and accrued taxes, and,

(b) Where another bidder at the time of confirmation offers to pay $10,000.00 more than the bidder at sale, and

(c) Where the original bidder raises his bid in the Court but does not bid as high as the increased amount of the second bidder.

2. Where the District Court refuses to confirm a bid at auction sale because of a substantially increased bid, should the Circuit Court direct the court to confirm to the first bidder at the price originally bid and less than his increased offer, or should the Court direct a resale at public auction where the highest bidder is willing to put up a bond to guarantee that he will bid at least the amount of his higher bid and pay the costs of such resale?

SUMMARY STATEMENT.

Stanley Engineering Corporation is in bankruptcy under Chapter 10 of the Bankruptcy Act.. April 8, 1947 the bankruptcy court authorized the sale of assets. The real estate involved was appraised, for liquidation purposes, at $50,000,00. The Court had theretofore, pursuant to a petition of the Trustee, authorized the sale of this real estate discharged of liens so that the mortgagee and all other lien holders were relegated to the proceeds of the sale.

The unpaid principal of mortgage is $52,900.00 with accrued interest thereon at six percent from May 2, 1946 and with the 1947 taxes in the amount of $1293.75 and an insurance bill for over $1531.00.

At such sale Morris Galman made the highest bid of $57,250.00. Arithmetical calculations would indicate that the Trustees would get nothing out of such real estate sale. The amount would be consumed by the mortgage, accrued interest and taxes and other liens and charges.

On the following day at a hearing in the District Court on confirmation, the Gaby Company offered $63,250.00. District Judge Welsh continued the hearing to consult with his colleagues on the bench.

At such continued hearing, Galman agreed to match the latter's bid. Gaby then raised its bid to $67,250.00, $10,000.00 more than was bid at the auction and Galman refused to go that high.

Gaby had expressed its willingness to accept Judge Welsh's suggestion to enter a bond to insure the renewal of its bid at a new public sale, plus the expenses of advertising and incidental costs.

The District Court refused to confirm the Galman bid of $57,250.00, and when all present desired the matter to be concluded without a resale, directed the Trustees to make the sale to Gaby at its offer of $67,250.00.

On Galman's appeal to the Circuit Court of Appeals the matter was twice argued before the Judges of the Circuit Court. The majority decided that the District Court should confirm the sale to Galman at his original bid of $57,250.00. The two dissenting Judges agreed that the decree of the District Court directing the sale to be made to Gaby be reversed but stated that there should be a public resale of the property, the Gaby Company to file its bond guaranteeing that it would renew its bid of $67,250.00 and pay the auctioneer's costs of such resale.

REASONS FOR GRANTING THE WRIT.

I. The Judgment of the Circuit Court reduces the function of a U. S. District Court Judge in the exercise of his judicial discretion in refusing to confirm a bid for gross inadequacy to the performance of a ministerial act.

II. The exercise of a judicial discretion is properly exercised and should be upheld where confirmation is withheld from a bid at a bankrupt sale which would result only in paying an encumbrance holder his lien in the face of a substantially increased bid which would result in dividends to the U. S. government or to general creditors.

III. The proper administration of bankrupt estates requires the Court to order a public resale where confirmation of a sale is refused because of gross inadequacy conditioned upon the offeror executing a bond to bid the higher amount at such resale.

IV. The Circuit Court dissenting opinion states the established rule of procedure followed in sales of bankruptcy assets, where confirmation is denied in the District Court.

V. It is of the utmost importance that, in the absence of unusual circumstances, a uniform recognized procedure governing sales of bankruptcy assets be established, to the end that the paramount interest of creditors be conserved and the integrity of the judicial function be upheld.

VI. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Reed v. King, 157 F. 2d 868, decided November 11, 1946.

BRIEF OF ARGUMENT.

The Summary statement demonstrates that the District Court refused to confirm the sale because of the gross disparity between the highest auction bid and the price offered at the confirmation hearing. The well established principle of law applicable may be stated as follows:

I. THE DISTRICT COURT PROPERLY EXERCISED ITS JUDICIAL DISCRETION IN REFUSING TO CONFIRM THE SALE WHICH WOULD GIVE NOTHING TO CREDITORS IN THE FACE OF A BID WHICH WOULD GIVE CREDITORS TEN THOUSAND ($10,000) DOLLARS.

In VOL. IV, COLLIER ON BANKRUPTCY, page 1579, the principle is stated:

> "A grant or denial of confirmation or approval is, in a measure, the determination of a legal issue, since it involves an examination of the preliminaries to, and the conduct of, the sale. Yet it is also and possibly to a larger extent, a matter of business administration and practical management. * * * This element of business expediency necessarily determines the margin of judicial discretion, when deciding whether or not a sale should be confirmed."

In JACOBSOHN v. LARKEY, 245 Fed. 538, the rule was stated as follows:

> "When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting

aside the sale (Bankruptcy Act Sec. 70b) an appellate tribunal will not reverse its discretion by substituting its own nor will it otherwise disturb or interfere with its exercise, as long as it does not amount to an abuse of discretion."

In IN RE BURR MFG. AND SUPPLY CO., 217 Fed. 16, the case relied upon by the respondent in the argument before the Circuit Court, the court stated the principle as follows:

"The high bidders, however, have a standing which permits them to appear and urge the acceptance of their bids and the confirmation of the sale. They were brought to the sale by invitation of the court having done what the court asked them to do, they now have a right to ask the court to approve their acts. * * *

While such are the rights of successful bidders and while the policy of the law favors them as against lower bidders who attempt to overthrow them, *their rights, however, are not superior to the rights of creditors not to be deprived of their security at prices which are grossly inadequate. Therefore, the issue in this case is not between the low and the high bidders but is between the high bidders and creditors * * * parties with equal standing.* * *.*"

II. JUDICIAL DISCRETION EXERCISED IN REFUSING TO CONFIRM A BID BECAUSE OF A GROSS INADEQUACY SHOULD NOT BE REDUCED TO A MERE MINISTERIAL FUNCTION.

Here the District Court refused to confirm a sale at a bid of $57,250.00, and directed the acceptance of the bid of $67,250.00. The Circuit Court reversed the order directing the trustees to accept the bid of $57,250.00. While this part of the ruling may be open to question, when the Cir-

cuit Court requires the District Court to confirm the sale for $57,250.00 the Circuit Court relegates to itself the authority initially vested in the District Court. Surely such judicial discretion in that court cannot be reduced to a mere ministerial function.

In JACOBSOHN v. LARKEY, 245 Fed. 538, the Circuit Court laid down this rule:

> "When in a given case a price is grossly inadequate and when upon that ground confirmation should be refused, are matters within the judgment and discretion of the tribunal ordering the sale. When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting aside the sale (Bankruptcy Act, Section 70b), an appellate tribunal will not reverse its discretion by substituting its own, nor will it otherwise disturb or interfere with its exercise so long as it does not amount to an abuse of discretion. In re Shea 126 Fed. 153."

To the same effect is AMERICAN TRADING AND PRODUCTION CORPORATION v. CONNOR, 109 F. 2d 71.

Thus in SHIPE v. CONSUMER SERVICE CO., 29 F. 2d 321, cert. den. sub. nom. TUDOR v. SCHINDLER, 279 U. S. 850 (1929), the court made the following statement:

> "But when, as here, the advance offered before confirmation is nearly twenty per cent of the price bid, we could not say that the court's discretion was abused in making it possible again to offer the property at this increased upset price. * * *"

Of course, there is a distinction in the principle of law, which must be carefully noted, between the cases where an application is made to set aside a confirmation already made from those cases where a confirmation is denied.

In 4 COLLIER ON BANKRUPTCY, 14th Ed. Sec. 70.98, at pages 1584-86, this distinction is stated as follows:

"This represents a compromise between the policy of strengthening public confidence in the stability of judicial sales and that of strengthening the court's hand in its efforts to secure the *best possible result for the benefit of the estate under its protection. But when the court is faced with a request to set aside a sale and to undo what has already been done with the court's approval,* the balance turns in favor of the policy of strengthening public confidence in judicial sales and executed contracts, and, as we have seen, the sale will be set aside only if the grounds alleged are sufficient to invalidate a similar private transaction on equitable grounds."

In REID v. KING, 157 Fed. (2) 868, the trustee received a bid at the sale of $11.10 and $10.55 respectively per share for stock appraised at $10.00 per share. Before confirmation a new bidder offered $15.00 per share and the District Court refused to confirm the lower offer and ordered the higher bid be accepted. On appeal to the Circuit Court, the latter stated, page 869:

"There is involved the question whether the Court had the right to exercise its discretion in the premises notwithstanding the fact that the price originally offered was found not to be grossly inadequate."

* * * * * * * *

"The rule has been taken over by courts of bankruptcy under a statute whose *prime purpose is to dispose of the assets of the bankrupt at the highest prices obtainable in the interest of the creditors;* and not infrequently the conflict between this purpose and the need to inspire confidence in sales under the supervision of the court has given rise to uncertainties which are reflected in the decisions. *The courts have not always borne in mind the important distinction between setting aside a completed sale and refusing confirmation of a sale which has been made subject to the approval*

of the court. Morrison v. Burnette, 8 Cir., 154 F. 617, 624; In re Burr Mfg. & Supply Co., 2 Cir., 217 F. 16, 19; and the importance of a substantial offer at an advanced price after a sale has taken place, but before it has been confirmed, has not always been recognized. For example, in Sturgiss v. Corbin, 4 Cir., 141 F. 1, the alleged inadequacy was so slight that the court would have been justified in confirming the sale without reference to the gross inadequacy rule.

The result is that some inconsistency is found in the statement of the rule in reported cases and the courts in notable instances have departed from strict adherence to the rule and have refused confirmation in the interests of the creditors, even in the absence of unfairness or impropriety in the conduct of the sale, *when the trustee has received a reliable and substantial advance bid after the sale has been held.* In these cases the courts have accepted such an advance bid as sufficient without the accompaniment of those 'slight circumstances of unfairness' which in the earlier cases, such as Morrison v. Burnette and In re Burr Mfg. & Supply Co., supra, were thought necessary to justify a rejection of confirmation.

* * * * * * * *

The case before us does not relate to the setting aside of a completed sale but to the confirmation of a sale made subject to the court's approval. The concrete problem is whether or not the bidding should be reopened to let in a substantially higher bid. We see no reason why the court in this situation should not be permitted to exercise the authority granted it by the express terms of the statute to approve or disapprove the lower bid; or why the review of its decision on the point should not be limited by the rule which commits such decisions to the sound discretion of the court. In re Hagerstown Silk Co., 4 Cir., 69 Fed. 2d 790; *In re Wolke Lead Batteries Co.,* 6 Cir., 294 Fed. 509; *In re*

Shea, 1 Cir., 126 F. 153. *This course, in our judgment, will produce more satisfactory results than a strict adherence to a verbal rule of thumb devised long ago to govern sales in another field.*" (Emphasis ours.)

The PEWABIC MINING CO. v. MASON case, 145 U. S. 349, falls in the category of cases where a request is made to set aside a sale already confirmed—not one seeking confirmation. Nor was this a sale in the course of the administration of bankruptcy assets, where such administration seeks to secure the highest return for the creditors.

Even in a case where the Circuit Court affirmed the District Court in refusing to set aside *a sale already confirmed*, it stated it would have done so if the allegation of an increased offer of $10,000.00 could have been substantiated. KIMMEL v. CROCKER, 72 F. 2d 599. Said the Court in its opinion:

> "*If the record substantiated the assertions of the briefs and argument, quite a different case would be presented. It would clearly be an abuse of discretion to accept the lesser of two comparable bids.* In re Williams, C. C. A. 4, 197 F. 1. Bankruptcy courts should not administer properties encumbered by undisputed liens, unless there is a reasonable probability of there being a surplus over the encumbrances for the unsecured creditors. Bushong v. Theard (C. C. A. 5) 35 F. (2d) 690; In re National Grain Corp. (C. C. A. 2) 9 F. (2d) 802; In re Gimbel (C. C. A. 5) 294 F. 883; In re Harralson (C. C. A. 8) 179 F. 490; 29 L. R. A. (N. S.) 737; In re Goldsmith (D. C. Tex.) 118 F. 763, 767; Dugan v. Logan, 229 Ky. 5, 16 S. W. (2d) 763, cert. den. 280 U. S. 587, 50 Sup. Ct. 36, 74 L. Ed. 636; Remington on Bankruptcy, Sec. 2583. * * * Where there appears to be a substantial equity for the creditors, a bankruptcy court may sell free of liens, in order to realize on the equity; but it should not do so simply to accommodate the mortgagee."

At this time we think it pertinent to note that the appraisal of the real estate stated in the opinion of the Circuit Court as $50,000, is not such an appraisal as has ever been held to equal the "fair value" of the property.

Real estate value for tax purposes is one thing. Depending on its location, for tax purposes, it may be assessed at 80% of its fair value, or 50% of its fair value, or in some instances, 100% of its fair value. Therefore, without more, the assessment for tax purposes is no indication of its value.

Nor can any great weight be placed on the value placed upon it by the appraisers appointed by the Court. These persons appraised it at $50,000.00, "for liquidation purposes." The standard of value fixed as between a "willing buyer and a willing seller" does not exist in this case. The only real indication of its value may be judged from these circumstances—the mortgage encumbrances, accrued interest, and fixed charges amount to $57,250.00, the amount of Galman's bid. Gaby raised the offer to $63,250.00 and Galman raised its bid to $63,250.00. Gaby then bid $67,-250.00, and Galman fell by the wayside. This is evidential of its real value, sustained by Gaby's offer to rebid this amount on a resale which offer is guaranteed by a bond.

Furthermore, the District Court recognized that in the administration of bankruptcy proceedings it is the duty of all concerned in the administration to see that the assets realize the highest amount so that the creditors' interests, which are uppermost, should be adequately taken care of. It is our contention that the creditors' interests are far superior to the interest of a bidder at a sale. Any District Court Judge who would refuse to accept a bid which is substantially higher would be regarded as abusing the judicial discretion vested in him to an extent that the uninformed layman would express skepticism of such Court action.

We urge that it is a far greater obligation on a District Judge to accept a substantially higher bid than it is to subscribe to a doctrine of aiding bidders at public sales.

III. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS ERRONEOUS IN REVERSING AND ORDERING THE ACCEPTANCE OF THE ORIGINAL BIDDERS LOWER BID, INSTEAD OF ORDERING A RESALE ON CONDITION ASSURING THE HIGHER BID.

The majority opinion of the Circuit Court makes this statement:

> "Rather than condone appellee's failure to bid at the proper place and time, it was incumbent upon the court below, in view of the circumstances, to follow the instructions contained in Jacobsohn v. Larkey, supra, at page 543:
>
> 'Having found gross inadequacy of the price bid at the first sale, the court might validly set aside that sale on that ground *and at the same time make an order for a second sale conditioned upon terms* that would secure to the estate whatever advantage it derived from the bids at the first sale.' (Emphasis supplied.)
>
> Cf. Bovay v. Townsend, supra, in which the court, discussing a judicial sale, said (page 346):
>
> 'We are of opinion that the sole power of the court lay in either approving and confirming the sale or in setting it aside *and ordering another sale upon proper statutory notice.*' (Emphasis supplied.)"

It will be noticed that the majority opinion recognizes the practice to be followed where the District Court refused to confirm a sale because a substantially higher bid is made. Judge Welsh likewise recognized this rule when he stated that he was inclined to order a resale, and inquired whether Gaby would pay the costs of such resale and file a bond to guarantee its higher bid at the resale. To all of

which Gaby agreed, and suggested a bond of $25,000.00 which was acceptable.

It was only when every one present wanted to have the matter finally disposed of before him at this continued hearing that Judge Welsh ordered the Trustees to sell to Gaby.

It is therefore submitted that the Circuit Court of Appeals should have directed a resale of this property. The dissenting opinion very concisely states:

> "I believe, therefore, that the bankruptcy court, having exercised its discretionary power to withhold confirmation, was obliged to order a resale of the property in question, at which all interested would have the opportunity to bid, in accordance with the procedure set forth in the quotations from the *Pewabic Mining Co.*, *Jacobsohn*, and *Bovay* cases contained in the concluding paragraphs of the majority opinion."

It is urged that this is the proper procedure to be adopted in all these cases where the Lower Court refuses to confirm a bid because of a substantially increased offer. Both the majority and the minority opinions recognize this as the proper procedure. We believe that this procedure should have been directed by the Circuit Court of Appeals.

CONCLUSION.

We submit, therefore, that this Court should definitely settle an important rule of practice and procedure in the administration of bankrupt estates; that the confusion running throughout the cases between the rules applicable in judicial sales other than bankruptcy sales, and those obtaining in sales under the Chandler Act, should be set at rest so that they do not apply in the administration of bankruptcy estates. That the rules of law existing between confirmed sales and sales asking for confirmation be concisely

stated and established, and finally, that the discretion of the District Judge be not taken away solely upon the basis of a mathematical equation.

Respectfully submitted,

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IN THE

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No. 473. October Term, 1947.

STANLEY W. ROOT, WILLIAM J. EASTWOOD AND NORMAN KLAUDER, TRUSTEES OF STANLEY ENGINEERING CORP., BANKRUPT,

AND

GABY COMPANY,

Petitioners,

v.

MORRIS GALMAN,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The District Court did not render any formal opinion but entered the order on May 13th, 1947, from which the appeal was taken. The order is set forth in the record, page 43.

The opinion of the United States Circuit Court of Appeals was rendered on November 6th, 1947, and is not yet reported. It is set forth in the record, page 44.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on November 6th, 1947.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925, c. 229 Sec. 1, 43 Stat. 938, 28 U. S. C. 347 (a).

III.

QUESTIONS PRESENTED.

Where, pursuant to decree of Court a parcel of real estate is "knocked down" at public auction for an amount in excess of the fair appraised value, and the Court-appointed trustees enter into an agreement of sale with the high bidder, and thereafter, when the sale is submitted to the Court for confirmation a higher offer is made at the bar of Court, can the Court, in the exercise of its discretion, set aside the sale and award the property to the new bidder where the evidence shows that the sale was well advertised in advance, unusually well attended, properly conducted and without any fraud, unfairness, mistake or other impropriety, and without any finding of inadequacy of price?

IV.

STATEMENT OF THE CASE.

By decree of Court dated April 8th, 1947, the Trustees of the Stanley Engineering Corporation, bankrupt, were authorized to sell all the assets of the bankrupt at public auction (R. 41). The Bankrupt had been engaged in the tool manufacturing business and it maintained its plant at 214-34 W. Diamond Street, in the City of Philadelphia. Its assets consisted of the building and machinery and equipment. The real estate was independently appraised by three disinterested Court-appointed appraisers in the amount of $50,000.00 (R. 2). The machinery and equipment was appraised at $40,488.58 (R. 2). The City of Philadelphia also evaluated the real estate for taxation purposes for the year 1947 in the amount of $45,000.00 (R. 3). The sale was widely advertised and circularized both in Philadelphia and New York and printed catalogs sent to all persons and brokers who might possibly be interested and advertisements placed in the newspapers in New York and Philadelphia (R. 5). The sale was conducted on May 7th,

1947, on the premises, and it was attended by "a great number of people" (R. 5). The real estate was first put up for sale and there was spirited bidding, beginning at $35,000.00 and the property was finally "knocked down" for the highest bid of $57,250.00 to respondent, Morris Galman (R. 5). This high bid was 14½% in excess of the appraisal by the Court-appointed appraisers. Immediately after the acceptance of respondent's bid by the auctioneer, respondent then entered into a contract of sale with the agent of the trustees and submitted a certified check for 15% of the purchase price (R. 39). The machinery and equipment was sold the same day for the total sum of $49,504.91 (R. 2). The following day, counsel for the trustees presented a petition to the bankruptcy court to confirm the sale. Thereupon, counsel for the Gaby Company appeared before the bar of the Court on behalf of the Gaby Company and offered to purchase the real estate for the sum of $63,250.00 (R. 3). The Court then made inquiry concerning the method and conduct of the sale and the valuations placed upon the property by the Court-appointed appraiser and the valuation of the City of Philadelphia for taxation purposes and the facts above set forth were elicited. Counsel for the Gaby Company admitted "There was a pretty big crowd there. I never saw so many turn out for a sale. . . . In my opinion there was nothing at all irregular. The sale was one of the best conducted sales that I have seen in my experience at the bar" (R. 4). Counsel for the trustees advised the Court that the sale was a "good one", and vigorously urged the Court that it would be unfair to the high bidder at the sale as well as to the public in general if the sale were not confirmed (R. 5). Counsel for the trustees then informed the Court that counsel for the Gaby Company was present before the sale and all during the sale (R. 4). Counsel for Gaby Company further admitted that his client had made expenditures in connection with his inquiries about the property preceding his decision to bid (R. 32).

The United States attorney appeared on behalf of the Collector of Internal Revenue and the Navy Department and advised the Court of the Government's claims in the amount of Five Hundred Thousand Dollars and did not make any objection to confirmation of the sale (R. 35).

Notwithstanding the foregoing, the Court set aside the sale to respondent and thereafter the following took place a the bar of the Court (R. 32-33):

> "Mr. Abraham E. Freedman: We were the highest bidder, Your Honor, and we already have a certain status under the law which he (the new bidder) does not. Do I understand Your Honor to say that if we meet this bid now, we get the property, and that ends the matter now?
>
> "The Court: (No response.)
>
> "Mr. Abraham E. Freedman: Very well, sir. I am authorized to state we will match that bid and I think that should conclude the matter now.
>
> "The Court: I didn't say that, but that would be fair play.
>
> "Mr. Sheridan: We will go still higher.
>
> "The Court: Oh, I asked you for your highest bid. I don't want to be an auctioneer, now.
>
> "Mr. Abraham E. Freedman: That is exactly what I mean.
>
> "The Court: One more crack.
>
> "Mr. Abraham E. Freedman: One more chance?
>
> "The Court: You talk to your client and ask him what he wants to give.
>
> "Mr. Sheridan: We will go $67,250.
>
> "Mr. Abraham E. Freedman: Now, Your Honor, I object to that. First of all——
>
> "The Court: That is your highest bid?

"Mr. Sheridan: That is my highest bid, yes.

"The Court: What is yours?

"Mr. Abraham E. Freedman: I did not submit my figure. May I make a statement, Your Honor, for the record. I did not make my statement with the idea that it was going to be subject to another judicial sale . . ."

The Court then directed the sale previously made to respondent, be set aside and ordered that the property be sold to the Gaby Company, and a decree was entered to that effect (R. 43).

The Findings of the District Court.

Although the District Court entered no formal opinion, its findings are indicated in the record.

The District Judge made no suggestion of, or finding of inadequacy of price and found as a fact that there was no fraud or irregularity at any stage of the proceeding (R. 36). The sole basis for the action of the Court in setting aside the public sale was because the new offer was an increased bid of a substantial nature (R. 36).

The Findings of the Court of Appeals.

The Court of Appeals held that a public sale which is properly conducted and without any evidence of unfairness, fraud, mistake or other irregularity and without evidence of gross inadequacy should be confirmed, and it is an abuse of discretion to fail to do so. In the instant case the Court found that there was no suggestion or finding of inadequacy, gross or otherwise, of the price bid at the public sale and there being no irregularity in the conduct of the sale, the District Judge abused his discretion in failing to confirm the high bid.

V.
ARGUMENT.

Summary of Argument.

A public sale held pursuant to a decree of the bankruptcy court should not be set aside where there is no fraud, unfairness or other irregularity in the conduct of the sale, and where the price bid is not grossly inadequate. In determining the adequacy of the price, comparison must be made between the appraisal and the high bid at the public sale and not between that high bid and the new offer. In the instant case it is conceded that the sale was properly conducted and there is no suggestion or finding that the appraisal was erroneous or inadequate, nor is there any suggestion or finding that the high bid at the sale, which was 14½% in excess of the appraised value, was inadequate, gross or otherwise. Respondent therefore makes the following contention:

> The high bidder at public auction is entitled to confirmation of the sale as a matter of right, where the sale was fairly conducted and the price bid is in excess of the fair appraised value.

The Gaby Company Is Without Standing to Oppose Confirmation.

It could hardly be disputed that the creditors in any bankruptcy proceeding have a right to oppose confirmation of a sale for any valid reason, but the same right does not extend to third parties and particularly to any new or unsuccessful bidders who come before the Court after the sale. This was clearly pointed out in *Jacobson v. Larkey,* 245 Fed. 538 (CCA 3), as follows (p. 541):

> "We may lay aside any claim of right made by the low bidder to have the sale set aside in order to give him another chance to bid. There was no irregularity in the sale. He simply complains that he would

have bid higher if the property had been offered in a different way. The trustees offered the property in conformity with the order of sale, and as there is nothing to show either in the order of sale or in the manner in which the trustee executed it that the low bidder was injuriously affected, *he is without right to oppose confirmation. In re Burr,* 217 Fed. 16, 19, 133 C. C. A. 126.

"The high bidders, however, have a standing which permits them to appear and urge the acceptance of their bids and the confirmation of the sale. They were brought to the sale by invitation of the court, and having done what the court asked them to do, they now have a right to ask the court to approve their acts." (Italics ours.)

In the instant case, although the Gaby Company bid for and purchased certain of the machinery and equipment (R. 32), it did not enter any bid at the sale for the real estate but presented its bid for the first time when the petition for confirmation was presented to the Court. Most of the creditors were represented by the same counsel who represented the trustees and that counsel vigorously urged the Court to reject the new bid and confirm the sale (R. 5). The United States Attorney, appearing for the Government, offered no objection to confirmation (R. 35). Thus, the only person who opposed confirmation was counsel for the Gaby Company. Under these circumstances, the Gaby Company was without any right to oppose confirmation of the sale and upon that ground alone the District Judge should have declined to entertain any offer from the Gaby Company and should have confirmed the sale. Entirely aside of these circumstances, however, there was no basis for the Court to set aside the sale since there is a total absence of any evidence showing any irregularity in the proceedings or inadequacy of price.

Public Policy Requires Confirmation of a Sale at Public Auction in the Absence of Unfairness, Fraud, Mistake or Gross Inadequacy.

As a matter of practical necessity and public policy, the courts have uniformly and consistently sustained sales made at public auction in the absence of irregularities or gross inadequacy. The underlying policy for this practice is set forth in *Jacobson v. Larkey, supra,* wherein the Court stated, at page 541:

> ". . . Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. Public policy requires stability in such sales. The Ruby (D. C.) 38 Fed. 622; in re Burr, 217 Fed. 16, 19, 133 CCA 126. To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final, Pewabic Mining Co. v. Mason, 145 U. S. 349, 356, 12 Sup. Ct. 887, 36 L. Ed. 732; they are not to be disturbed except for substantial reasons.
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> "*After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid high on resale.* Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16; In re Metallic Specialty Mfg. Co. (D. C.) 193 Fed. 300; In re Shapiro (D. C.) 154 Fed. 673." (Italics ours.)

The same rule was advocated by the Supreme Court in *Pewabic Mining Co. v. Mason,* 145 U. S. 349, as follows (p. 356):

> "Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and

induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. . . ."

The rationale of the policy requiring confirmation of judicial sales is succinctly stated in *Knight v. Wertheim & Co.*, 158 F. (2d) 838 (CCA 2), as follows (p. 843):

> "We recognize that, except upon the extremest provocation, courts will not upset a judicial sale at auction, upon the ground that a new bidder has appeared who offers more than the knock-down price. (Citing cases.) This unwillingness results from the effect upon such sales of knowing that a prospective bidder may abstain from bidding at the auction, may bide his time, and may then outbid the price at which the property has been struck down. *That possibility tends to chill bidding at the sale, to dispose of the property by later competition on successive bids, and thus to defeat the very purpose of an auction,* which is to fetch together all those who may be interested to buy and to set them against each other with whatever stimulus that may provide, as opposed to other kinds of sale." (Italics ours.)

It is thus clear that the high bidder at a public sale is entitled to confirmation as a matter of right unless there be evidence of unfairness, fraud, mistake or inadequacy of price. The evidence in the instant case precludes the application of any of those exceptions and clearly requires confirmation of the sale.

There Was No Irregularity in the Proceedings or Inadequacy of Price.

There is not the slightest suggestion in the record that there was any unfairness, fraud, mistake or other irregularity, but on the contrary, the Gaby Company's own coun-

sel admitted it was the best attended and best conducted sale he had seen in his experience at the bar. Nor did the Court make any finding of any irregularity or inadequacy of price but rested his decision solely upon the ground that the new offer was an increased bid of a "substantial nature" (R. 36). As the opinion of the Court of Appeals carefully points out, this was not sufficient ground to set aside the sale.

Although the power of the Bankruptcy Court to confirm or set aside a judicial sale is not specifically defined by statute, there is, however, a provision in the Bankruptcy Act which does provide a guide for the courts in the exercise of their discretion. The Bankruptcy Act, as amended by Section 1, 52 Stat. 879 (1938), 11 U. S. C. A. Section 110 (f), provides as follows:

> "The Court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. . . ."

This section of the Act connects the appraisal with the sale and, in holding that the appraisal shall have a bearing upon and a relation to the sales price, the Court, in *Jacobson v. Larkey, supra,* said (p. 542):

> ". . . The appraisal, therefore, is the value data upon which the court subsequently acts in disposing of the bankrupt's property. To obtain such data the statute provides (section 70b) that 'all real and personal property belonging to bankrupt estates shall be appraised.' Certainly this means that the property shall be appraised before it is sold, and as it is pro-

vided in the same section that property 'shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value', the statute connects the appraisal with the sale and plainly intends 'that the value of the property as appraised shall have a bearing upon and a relation to the price at which the court, in the exercise of its discretion, shall confirm or set aside the sale."

In the instant case the District Court considered only the disparity between the sales price and the new bid and overlooked the appraisal value entirely. This was material error as the Court held in *Jacobson v. Larkey, supra,* as follows (p. 542):

". . . In the exercise of this discretion the trial court in this case found that the prices bid were grossly inadequate. It based its judgment, as we read the record, not on the difference between the bids made at a second, but upon the disparity between the prices bid and the property valuations made by the appraisement. . . .

"Had the court refused confirmation of the sale upon a finding of an inadequate price, based upon the difference between the bids made and the bids proposed, it would have exercised a discretion of doubtful validity. Morrisse v. Inglis, supra; In re Metallic Specialty Mfg. Co., supra; In re Shapiro, supra. . . ." (Italics ours.)

Thus, the District Court committed clear error in failing to judge the adequacy of the sales price by its relationship to the appraisal rather than to the proposed bid. The District Judge accepted the new bid solely upon the ground that the increased offer of ten per cent was an advance of a "substantial nature". This sort of practice has long since been discarded in this country as the Supreme Court said in *Ballentyne v. Smith,* 205 U. S. 285, where the Court

commented upon advance bids of ten per cent and held as follows (p. 290):

> "In England the old rule was that in chancery sales, until confirmation of the master's report, the bidding would be opened upon a mere offer to advance the price ten per cent; *but this rule has been rejected, and now both in England and this country a sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness.* But if there be great inadequacy, slight circumstances of unfairness in the conduct of the party benefited by the sale will be sufficient to justify setting it aside. Graffam v. Burgess, 117 U. S. 180, 191, 192. It is difficult to formulate any rule more definite than this, and each case must stand upon its own peculiar facts." (Italics ours.)

Thus, not only must the adequacy or inadequacy be measured by its relationship to the appraisal, but any inadequacy, before it can be considered sufficient to set aside a judicial sale, must be so great as to shock the conscience of the Court. As the Court said in *Jacobson v. Larkey, supra* (p. 543):

> ". . . As the provision conferring upon the court authority to confirm the sale declares that that authority shall be exercised when the price bid has a given relation to the value appraised, it is clear to us that the statute intends that the appraisement shall be employed by the court as a guide in the exercise of its discretion. *When the purchase price approaches the appraised value it leads the judgment of the court in one direction; when the disparity between the purchase price and the appraised value is so great as to suggest fraud or to shock the conscience of the court, then it directs the court's judgment in another direction. . . .*" (Italics ours.)

It follows that in any case where the sales price is not less than the appraisal, the sales price must be held adequate as a matter of law, where there is no irregularity in the sale. The difficulty arises not where the sales price equals or exceeds the appraisal but where it is less than the appraisal, in which situation the Court must determine whether the sales price is so much lower as to be grossly inadequate before it can set the sale aside. In *Sturgis v. Corbin,* 141 Fed. 1 (CCA 4), the property was "knocked down" at a judicial sale for $200,200.00 and thereafter when the petition was presented for confirmation a new bid $8000.00 in excess was offered and accepted by the District Judge. The Court of Appeals reversed and remanded the case with instructions to confirm the high bid at the sale upon the ground that the District Court had abused its discretion in setting aside the sale because of mere inadequacy. Said the Court (p. 3):

> ". . . A sale made under a judicial decree will not, when no understanding existed among the bidders, and when no fraud is shown, be set aside for mere inadequacy of price, unless such inadequacy is so gross as fairly to raise a presumption of fraud. The practice of opening biddings and of setting aside sales made during the progress of judicial proceedings should not be encouraged, as it is not conducive to the interests of litigants, and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the terms thereof, or who shows his willingness and ability so to do, is not only entitled to the protection of the court, but as a party to the proceeding, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of the inadequacy, fraud, or mistake before alluded to.
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> "The Supreme Court of the United States, speaking through Mr. Justice Bradly in Graffam v. Burgess,

117 U. S. 180, 191, 6 Sup. Ct. 686, 692, 29 L. Ed. 839, said:

> " 'In this country Lord Eldon's views were adopted at an early day by the courts, and the rule has become almost universal that a sale will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience or unless there be additional circumstances against its fairness; being very much the rule that has always prevailed in England as to setting aside sales after the master's report had been confirmed.' "

In a similar manner the District Court in *Re Metallic Specialty Mfg. Co.*, 193 Fed. 300, reversed the referee in bankruptcy where the high bid at the sale was $17,000.00 and the referee later accepted and confirmed a later bid seventeen per cent higher. In remanding the case with instructions to confirm the high bid at the sale, the Court said:

> "Warner's bid, which was $17,000, was made and accepted at a public sale regular in all respects and free from fraud. The sale was judicial, and therefore could not become final until approved by the referee or the District Court. But it could be set aside only for cause, properly shown, and sufficient to move the conscience of the court. One such cause is gross inadequacy of price, but there is no contention that the bid in question was grossly inadequate. The sale was set aside on the ground that Warner's bid was lower than the value of the property, and this was inferred from the difference between the two sums. The referee states:
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> > " 'The whole question before the court (is) whether an advance bid of $3,000, or 17 per cent. in excess of the price paid at public sale, is sufficient evidence of inadequacy of price at the public sale to justify my having ordered a resale.'

"But it is well settled that mere inadequacy is not enough. Sturgiss v. Corbin, 141 Fed. 1, 72 C. C. A. 79, 15 Am. Bankr. Rep. 543; Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803. It must be admitted that no hard and fast line can be drawn between mere inadequacy and gross inadequacy; but there is a difference, although it is impossible to state it with precision. Every case must necessarily be judged upon its own facts.

. . . . . .

"The order of January 24, 1912, is reversed, and the referee is directed to confirm the sale held on January 18th."

In summary, it may fairly be stated that the high bid at a public sale must be confirmed in all those cases where the price is not less than the appraisal value and in those instances where the sale price is less than the appraisal but not grossly inadequate. It is only where the price is so grossly inadequate as to shock the conscience of the Court that the sale may be set aside because of inadequacy.

Petitioner brushes aside these rules of law and urges the acceptance of the Gaby Company bid because, it is contended the sale to the respondent leaves nothing for the creditors while the Gaby Company offer gives $10,000.00 to the creditors. Aside of the fact that this reasoning cannot be sustained under any rule of law, the statement that the creditors will receive nothing if respondent's bid is accepted but will receive $10,000.00 if petitioner's offer is accepted, is a completely erroneous statement of fact. It is based upon the assumption that the lien of the mortgage attaches only to the bare real estate and it overlooks the proceeds from the sale of the machinery which is also subject to the lien of the mortgage.

In *Central Lithograph Co. v. Eatmor Chocolate Co.*, 316 Pa. 300, the Pennsylvania Supreme Court held that the lien of the mortgage attached to all of the "freehold"

and in defining the extent of the term "freehold", the Court said (p. 304):

> ". . . 'Whether fast or loose, . . . all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold.' "

Petitioner fails to point out that in the instant case the machinery and equipment which was thus likewise subject to the lien of the mortgage was separately appraised by the Court-appointed appraisers in the amount of $40,488.58 (R. 2), and was sold immediately after the real estate was "knocked down", for the sum of $49,504.91 (R. 2). Interesting to note is the fact that both petitioner and respondent made purchases from this equipment (R. 32). The sum realized for the machinery and equipment, together with the respondent's bid of $57,250.00, made a total of $106,754.91 for the property and the operating equipment, which was subject to the lien of the mortgage. It is hardly accurate therefore, to say that the creditors would receive nothing if the sale to respondent is confirmed. Here again it must be noted that the only creditor who could take any proceeds after the lien of the mortgage is satisfied, is the United States, by virtue of its priority claims for $500,000.00. We repeat, however, that even if the petitioner's premise were correct, it could not possibly justify the setting aside of a sale which was properly conducted and no showing of gross inadequacy.

In the instant case, every opportunity was afforded to the creditors and all parties in interest to object to confirmation of the sale to respondent upon any ground. No objection was made by the creditors either that there was any irregularity in the conduct of the sale or upon the adequacy of the sales price. Nor did the Gaby Company, which had no standing before the Court, complain of any irregularity or introduce any evidence to show that the price was inadequate. If there was any question about

the adequacy of the price, it would have been entirely proper to offer the testimony of other appraisers disputing the valuation fixed by the Court-appointed appraisers. No such evidence was offered but, on the contrary, the sole creditor in interest, the United States Government, appeared and offered no objection to the confirmation. Very significant, also, is the fact that counsel for the very trustees whose names appear as co-petitioners with the Gaby Company in this proceeding, vigorously urged the Court to reject the Gaby bid and confirm the public sale. The statement made by counsel for the trustees who have joined in this petition is most illuminating and to the point, as follows (R. 5-6):

> "Mr. Rosen: The sale was advertised once a week for at least five weeks.
>
> "We had display advertisements in the Philadelphia Inquirer and in the New York Times, in addition to which these catalogs were sent to all kinds of people who would be interested in the purchase of the personal property, and were sent to all real estate brokers in and about Philadelphia and New York. The sale was very widely circularized and advertised.
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> "I had innumerable calls about the sale, so did my associate counsel, Mr. Bennett and Mr. Jenkins.
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> "I was present at the sale. To my knowledge people whom I observed and whom I know to be real estate brokers in Philadelphia, were there, at least a dozen real estate brokers. Mr. Sheridan (counsel for Gaby Company) was there. I saw him before the sale started.
>
> "I do not represent this purchaser, but I do want to say something about these public sales, because I have always advocated them as being the best means of getting the top dollar for the trustees in these cases, and for the purpose of preventing any collusion, or fraud, or arrangements of any kind.

"There were three men who were bidding on this property, three different people. The bidding started with something like $35,000 or $36,000, and went all the way up to $57,250, when Mr. Galman was the successful bidder.

"After he bid in the real estate I understand, Your Honor, he purchased a substantial amount of equipment there that goes with the building from the auctioneers, and bid a pretty good price for it.

"I think it would be unfair to him, as well as to the public in general, if a person could attend a public sale that has been widely advertised, and circularized, and attended by a great number of people, and he has every opportunity to bid at the sale, and does not bid, but waits until it is knocked down to the successful bidder, and then comes into court on the following day and increases the bid. I think it is unfair and it will lead people to believe and to feel that there is no point in bidding at a public sale—we will simply wait and see what happens and then go into court and increase the bid if we feel that we want the property.

"I hold no brief for the purchaser, I do not represent him, and I hold no brief for Mr. Waxman. They are both estimable and reputable businessmen in the City of Philadelphia, I know them both, but I do say that if we are going to have interference in public sales ordered by the court it will have a bad effect. A public sale should be final, unless the Court is satisfied that the sale was improperly conducted, or was not advertised properly, or there was fraud, or collusion, or anything of that kind. It is obvious there is nothing like that in this case."

Conclusion.

The Circuit Court of Appeals was clearly correct in reversing the District Court and remanding the case with instructions to reinstate the sale made at public auction. Its decision is based upon uniform and well established rules of law and there is no conflict which warrants review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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